American Spring Bed Manufacturing Co., d/b/a American Chain Link Fence Co. *and* District II, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC. Cases 1-CA-13732 and 1-CA-13923

April 7, 1981

DECISION AND ORDER

On September 18, 1978, Administrative Law Judge Norman Zankel issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings,[1] findings,[2] and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order, as modified below.

1. Respondent has excepted, *inter alia*, to the Administrative Law Judge's finding that it violated Section 8(a)(1) of the Act by promising wage increases and adjustment of employee grievances on September 23 in response to the protected concerted activities of its employees. The credited evidence reveals that on September 19 some of Respondent's employees stopped working. They spoke with Respondent's assistant general manager, Sullivan, and complained about their wages and asked about discriminatee Smith's wages. On September 23, Sullivan called a meeting of the production and maintenance employees and told them that he would try to correct their complaints and would see if he could get them wage increases. The Administrative Law Judge concluded that in view of the "totality of circumstances," Respondent's promises were made to discourage the employees from continuing to engage in protected concerted activities, and thus violated the Act. We disagree.

There is no evidence that these promises were made with the purpose of discouraging the employees from engaging in protected activity or for antiunion reasons. Indeed, there was no union activity among Respondent's employees at that time. Accordingly, we find in agreement with Respondent that Respondent did not violate the Act on September 23 when Sullivan told the employees that he would try to get them wage increases and to correct their complaints.

2. We consider without merit, however, Respondent's exceptions to the Administrative Law Judge's finding that the October 12, 1977, terminations of employees Scott and Smith were in retaliation for their union and other protected concerted activities.

The Administrative Law Judge found that Smith and Scott were hired on September 6 and 12, 1977, respectively. It appears they were hired to facilitate the manning of a night shift, which Respondent considered an integral part of its operation but which it had experienced considerable difficulty in staffing since April. Beginning in mid-September, Smith began to complain to Respondent and to fellow employees that he was receiving lower wages than had been promised. This resulted in a short work stoppage by the employees and a warning to Smith that he should stop complaining if he wanted to keep working for Respondent. The Administrative Law Judge found that Respondent's warning of Smith violated Section 8(a)(1) of the Act. We agree.[3]

Following the mid-September incidents, Smith continued to complain to Respondent about his wages. Finally, in late September, he contacted the Union. An organizational meeting was scheduled for October 2 and Smith, with the assistance of Scott, invited employees to attend the meeting. At the meeting, authorization cards were signed and, on October 5, the Union sent a request for recognition to Respondent, which was received the following day. Respondent declined to recognize the Union on October 12, on which day it also notified Smith and Scott that they were terminated. In terminating Smith and Scott, Respondent informed them that it was "letting the night shift go." Nonetheless, Respondent transferred employees Vega

[1] We find no merit in Respondent's exception to the Administrative Law Judge's refusal to sequester one or both of the named discriminatees during the hearing. Although the Board has recently modified its rules regarding the sequestration of potential witnesses, *Unga Painting Corporation*, 237 NLRB 1306 (1978), the hearing in this proceeding occurred prior to the announcement of this change, which was not retroactive. *Curlee Clothing Company*, 240 NLRB 355 (1979). As stated in *Standard Materials, Inc.*, 240 NLRB 969 (1979), sequestration is a procedural matter. The hearing herein was conducted in accordance with the then-existing procedural rules. In any event, we find that Respondent was not prejudiced by the Administrative Law Judge's refusal to exclude the discriminatees from any part of the hearing. Although discriminatee Scott was present while discriminatee Smith testified and later corroborated Smith, Scott's testimony differed in phraseology, order, emphasis, and details regarding the area of their overlapping testimony; i.e., the September 23 meeting. Further, Respondent's witness, Sullivan, admitted that at this meeting he made most of the statements attributed to him by both discriminatees. Finally, we find, *infra*, that Sullivan's statements during the September 23 meeting did not violate the Act; this was the principal area of corroboration between the testimony of Scott and Smith.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] That Smith's claim of entitlement to higher wages appears to have been without merit in no way detracts from the protected nature of his activity. *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9, 16 (1962).

and Ortiz to the night shift to replace Smith and Scott.

After their terminations, Smith asked Respondent if there was any chance of his returning to work; he was told no. Similarly, Scott made repeated calls to Respondent regarding the possibility of being rehired. During a conversation with Assistant General Manager Sullivan shortly before Christmas, his query as to whether there was still no work was answered "yes, and by the way weren't you one of the ones to have . . . something to do with the Union."

The Administrative Law Judge found that the terminations of Smith and Scott were in retaliation for their activities on behalf of the Union. First, contrary to Respondent, there is ample evidence that Respondent was well aware of the employees' involvement with the Union. It had warned Smith about engaging in protected concerted activity less than 1 month before his termination. The Administrative Law Judge noted that Smith and Scott were the only two employees who actively promoted the Union. And there is evidence that Respondent interrogated Working Foreman Rosario (who had been solicited previously regarding the Union by Smith) on October 6 and 7 about who was trying to organize the Union.[4] Additionally, the Administrative Law Judge relied upon, among other things, the so-called small plant doctrine. Thus, the record shows that Smith and Scott discussed the Union and the planned union meeting with employees at Respondent's plant. In view of Respondent's small employee complement (at most 20 employees) and record evidence that Smith and Scott discussed the Union with employees at the plant, we infer that Respondent's various management personnel had ample opportunity to observe these discussions and in fact did so. See *N.L.R.B.* v. *Joseph Antell, Inc.*, 358 F.2d 880 (1st Cir. 1966). Finally, Sullivan's pre-Christmas comment to Scott acknowledging Respondent's suspicion that he (Scott) had been one of two employees who had promoted the Union erases any doubt that at the time of their terminations Respondent was fully aware of Smith's and Scott's activities on behalf of the Union.

Respondent's animus toward the Union and the protected concerted activities of its employees is also well supported in the record. Mafera admitted on the record that he opposed the unionization of Respondent's employees. In addition, Respondent's actions in mid-October must be considered in light of its unlawful warning of Smith about his protected activity in mid-September. Further, the Administrative Law Judge found that Respondent solicited Rosario to communicate to employees Respondent's opposition to the Union. Accordingly, we believe it scarcely can be disputed that Respondent harbored animus toward the Union and toward the concerted activities of its employees.

Respondent's claim to have terminated Smith and Scott for legitimate business reasons (less than a week after it received the Union's demand for recognition) was correctly rejected by the Administrative Law Judge. Thus, Respondent's statement to Smith and Scott that it was "letting the night shift go" was patently false in view of the fact that after Smith and Scott were terminated Respondent promptly transferred two employees, Vega and Ortiz, from the day shift to the night shift. See *Shattuck Denn Mining Corporation (Iron King Branch)* v. *N.L.R.B.*, 362 F.2d 466 (9th Cir. 1966). And Respondent's attempt, at the hearing to rely upon Smith's and Scott's alleged low production, was not supported by the record nor mentioned to Smith or Scott at any time prior to their terminations. See, e.g., *J. R. Townsend Lincoln-Mercury*, 202 NLRB 71, 78 (1973). Further, Respondent's claim that it decided to terminate Smith and Scott after it determined that it employed too many machine operators contradicts its long history of employing extra machine operators. Finally, the Administrative Law Judge noted that the decision to terminate the two employees—the only employees ever laid off by Respondent—was made by Mafera and not Sullivan who ordinarily was in complete charge of Respondent's personnel decisions; indeed Sullivan was not even consulted.

The foregoing evidence submitted by the General Counsel effectively shifted the burden to Respondent to show that the discharges would have occurred even in the absence of Scott's and Smith's participation in clearly protected activities.

We find that Respondent's affirmative defense, its reliance on business considerations in terminating Scott and Smith, is wholly without merit. The Administrative Law Judge correctly found, for the reasons set forth above, that the claimed reasons were not in fact relied upon. They were pretexts to

[4] In support of this finding the Administrative Law Judge relied upon the testimony of Smith that Rosario had told him that he (Rosario) had been interrogated by Respondent regarding the Union. Clearly, such testimony was hearsay, but Respondent did not object to its admission. And, although hearsay evidence may not always be entitled to as much weight as direct testimony, it can constitute substantial evidence, particularly when there are circumstances which corroborate its credibility. See, e.g., *Alvin J. Bart and Co., Inc.*, 236 NLRB 242 (1978). Here, the testimony is essentially unrebutted. Although General Manager and Corporate Treasurer Mafera and Assistant General Manager Sullivan denied discussing union activity with Rosario, Plant Superintendent Gardner, who was available, was not called to testify. In such circumstances, an inference may be drawn that had he testified his testimony would have been adverse to Respondent. See *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939).

mask Respondent's unlawful motive.[5] We affirm the Administrative Law Judge's conclusions that the terminations violated Section 8(a)(3) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, American Spring Bed Manufacturing Co., d/b/a American Chain Link Fence Co., Medford, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order, as modified below:

1. Substitute the following for paragraph 1(a):

"(a) Threatening to discharge employees in order to discourage their protected concerted activities."

2. Substitute the following for paragraph 2(a):

"(a) Offer Kevin W. Scott and Joseph L. Smith immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make each of them whole for any loss of earnings they may have suffered due to the discrimination practiced against them by paying each of them a sum equal to what he would have earned, less any net interim earnings, plus interest, to be computed according to the formula described in the section of the Administrative Law Judge's Decision entitled 'The Remedy.'"

3. Substitute the attached notice for that of the Administrative Law Judge.

[5] We therefore find it unnecessary to pass on the Administrative Law Judge's further conclusion that, even assuming a valid ground for the discharges based on an excessive number of machine operators, Respondent has failed to show that this reason alone would have caused Respondent's actions.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT threaten to discharge any of you because you engage in activities together seeking to improve your wages, hours, or other terms and conditions of employment.

WE WILL NOT grant wage increases in order to discourage you from engaging in union activity.

WE WILL NOT do anything which puts any of you in a position where you are required to make public your union sympathies or interest.

WE WILL NOT discriminate against any of you by discharging you because you engage in protected concerted or union activities.

WE WILL NOT in any other manner say or do anything which interferes with, restrains, or coerces you in the exercise of any or all of the rights described above.

WE WILL offer Joseph L. Smith and Kevin W. Scott immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make each of them whole for all moneys lost as a result of our discrimination against them, with interest.

WE WILL, upon request, recognize and bargain collectively in good faith with District II, International Union of Electrical, Radio & Machine Workers, AFL-CIO-CLC, as the exclusive collective-bargaining agent for your wages, hours, terms, and conditions of employment, and all other matters appropriate for collective bargaining; and, if agreements are reached, WE WILL put them in writing, if requested, and will sign that written document. The appropriate unit for collective bargaining is:

All production and maintenance employees, including working foremen, employed by us at our Medford, Massachusetts, location, excluding office clerical employees, professional employees, guards, and all supervisors as defined in the National Labor Relations Act, as amended.

The collective-bargaining obligation which we undertake will be retroactive to October 6, 1977.

AMERICAN SPRING BED MANUFACTURING CO., D/B/A AMERICAN CHAIN LINK FENCE CO.

DECISION

STATEMENT OF THE CASE

NORMAN ZANKEL, Administrative Law Judge: These cases were heard before me on March 27-29 and June 6-7, 1978, at Boston, Massachusetts.

Upon a charge filed in Case 1-CA-13732 by District II, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC (hereinafter called the Union), and upon a charge filed by the Union on December 5, 1977,[1] in Case 1-CA-13923, an order consolidating cases, amended complaint and notice of hearing was issued on January 11, 1978, by Robert S. Fuchs, Regional Director for Region 1 of the National Labor Relations Board (hereinafter the Board), against American Spring Bed Manufacturing Co., d/b/a American Chain Link Fence Co. (hereinafter called Respondent).

In essence, the complaint, which was further amended orally at the hearing, alleges that Respondent interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the National Labor Relations Act, as amended (hereinafter called the Act), by engaging in a variety of unlawful conduct; violated Section 8(a)(3) of the Act by the termination of employees Joseph L. Smith and Kevin W. Scott; and violated Section 8(a)(5) of the Act by failing to recognize the Union as collective-bargaining representative of an appropriate unit of employees while, at the same time, engaging in conduct destructive of the employees' rights; and by engaging in other specific conduct which derogated from the Union's majority status.

Respondent's timely answer to the complaint, while admitting certain allegations, denies the commission of any unfair labor practices.

All issues were fully litigated at the hearing; all parties were represented by counsel and were afforded full opportunity to examine and cross-examine witnesses,[2] to introduce evidence pertinent to the issues, and to engage in oral argument. Post-hearing briefs were received from counsel for the General Counsel and counsel for Respondent and have been carefully considered.[3]

Upon the entire record, and from my observation of the witnesses, and their demeanor in the witness chair; and upon substantial, reliable evidence, "considered along with the consistency and inherent probability of testimony" (*Universal Camera Corporation* v. *N.L.R.B.*, 340 U.S. 474, 496 (1951)), I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent, a Massachusetts corporation, has at all times material herein maintained its principal office and place of business at 24-26 Ship Avenue, Medford, Massachusetts, where it has been engaged in the manufacture, sale, and distribution of chain link fence and related products.

Annually, Respondent purchases, transfers, and delivers good and materials valued in excess of $50,000 to its Medford, Massachusetts, location directly from States other than Massachusetts.

Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties agree, the record reflects, and I find that the Union has, at all times material herein, been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent's supervisory staff, relevant herein, consists of general manager and corporate treasurer, Guy Mafera; assistant general manager, George Sullivan; and plant superintendent, Ken Gardner. Additionally, two employees were identified by the managerial officials who testified at the hearing (Mafera and Sullivan) as working foremen. These two employees are Juan Rosario and Richard Riccardi. Riccardi, Mafera's nephew, was principally assigned to the shipping department. Rosario worked in the production department.

Of relevance herein are two types of production equipment. The first is called a wire-draw machine and the other is called a wire weaving machine. There was one wire-draw machine and four weaving machines. Three of the weavers were called Bergundi and the fourth was called Blashill. Respondent's production operation required, in relevant part, raw wire to be reduced to a proper diameter and length by the wire-draw machine and then woven into a mesh-like design for use as fencing. The final production function consists of galvanizing the woven fencing for protection against the elements.

Smith and Scott started their employment with Respondent on September 6 and 12, respectively. It is undisputed that each of them was hired especially to work on Respondent's night shift during which, customarily, the wire-draw machine and one weaving machine were in operation. Both Smith and Scott were hired because Respondent had extreme difficulty, since at least April, in maintaining a night work force.

The complaint allegations herein emanate from certain activity of the production and maintenance employees in September which, the General Counsel contends, consti-

[1] All dates are in 1977, unless otherwise stated.

[2] The witnesses were sequestered.

[3] In reaching my conclusions and making the findings thereon I shall not completely discuss each and every one of the conflicts of testimony appearing in the record, and will not deal with each and every argument of counsel contained in their post-hearing briefs. However, I am mindful of each of these matters in my consideration of the issues. The General Counsel's unopposed motion to correct the official transcript is hereby granted.

tutes protected concerted activity and from the subsequent union efforts to unionize the shop.

It was Smith who, in late September, communicated with Reyes, the union organizer, and arranged for a meeting between Reyes and the production and maintenance employees. Smith invited substantially all the production employees to a union meeting held October 2, while Scott solicited at least one employee (Jewers) to attend the meeting. Both Smith and Scott were terminated by Respondent on October 12.

B. *Interference, Restraint, and Coercion*

(1) In paragraph 8(a) of the complaint it is alleged that Respondent, in mid-September, threatened employees with reprisals because they engaged in protected concerted, or union, activities. This allegation is based on Smith's testimony, which I credit for reasons stated below, that on September 19, he was called into Sullivan's office where (with Gardner present) Sullivan told him that he should stop discussing his pay rate. According to Smith, Sullivan told him that Smith's earlier wage discussions with the production employees upset him (Sullivan) and the employees. Smith testified that Sullivan said Smith must learn to keep his mouth shut about his pay if he wanted to continue working with Respondent. According to Smith, Sullivan told him that if he continued complaining, Sullivan would have "to do something about it."

Sullivan acknowledged that he had a conversation about the wage rate with Smith on the day indicated. He said the meeting was stimulated by the production employees having earlier that day complained to him that Smith had apparently been receiving a higher wage rate than they. Sullivan testified that he asked Smith, "Don't you think what you're making is your own business?" and, according to Sullivan, Smith agreed, apologized for having raised the issue among the employees and left Sullivan's office. Sullivan unequivocally denied threatening Smith with loss of his job.[4]

The events of this day had their genesis in Smith's observation of an apparent discrepancy in his pay. The evidence reveals that Smith was hired at the rate of $3 per hour plus a 25-cent night shift differential. Smith testified that he believed he was to receive $4 per hour. Although Respondent sought to discredit Smith by producing evidence which I find reflects that it is unlikely Smith had a factual basis for such belief, I conclude this is insufficient ground to detract from his veracity because it is undenied that Smith actually harbored the mistaken belief he had been underpaid. Smith started to work on the night shift on September 13. When he received his first paycheck covering his nightwork, he discovered the apparent discrepancy. Smith immediately complained to Gardner who, according to Smith, shrugged him off. This occurred on September 16, a Friday. After his discussion with Gardner, Smith testified that he brought his problem to the attention of the other production employees that day. During these discussions, he told the employees of the higher wage rate he believed he had been promised. Some of the other employees told him they also believed they were not receiving the full pay, which they had been promised. Smith credibly testified some of the other employees were upset that, according to his reports to them, he was receiving a higher wage rate than they. (This is inherently logical because Smith only had been employed approximately 1 month at that time.)

On the next workday, September 19, some of the production employees stopped working. With employee G. Garcia as spokesman, three or four of them approached Sullivan to complain about their wages. Sullivan acknowledged that he was asked why Smith was earning more, and that they requested wage increases for themselves. Sullivan admitted telling these employees that what any other employee was earning was none of their business. Nonetheless, Sullivan explained to the employees that Smith's wage rate was based on his assignment to the night shift. Sullivan's meeting with the employees occurred during the morning and it was in the afternoon of the same day that Sullivan spoke with Smith and made the alleged unlawful threat.

As indicated, I credit Smith's version over Sullivan's. In doing so, I have considered the effect of the following factors: (1) In many respects, Sullivan's admissions and other testimony corroborates Smith's version. Thus, it is undenied that a group of employees obtained an audience with Sullivan on September 19 and the subject was the apparent disparate wage rates. Sullivan acknowledged telling the employees of his displeasure regarding their discussion of this subject matter. Finally, Sullivan agreed with Smith that the purpose of speaking with Smith that afternoon was to admonish him regarding continued wage rate discussion; (2) Sullivan's testimony regarding the employee group meeting was pervaded with generalization. During his direct examination, Sullivan testified that he informed the employees that wage rates were none of their business and told them to mind their own business. When pressed on cross-examination, Sullivan denied that he told the employees to mind their own business. I consider this testimony to also be an example of self-contradiction and evasion. In contrast, Smith's testimony was direct and specific. Smith generally impressed me as a forthright witness; (3) I consider Gardner's failure to testify justifies making an adverse inference, which I do, that had he done so his testimony would have been contrary to Sullivan's denial he threatened Smith. *Interstate Circuit, Inc., et al.* v. *United States*, 306 U.S. 208 (1939); *N.L.R.B.* v. *Sam Wallick and Sam K. Schwalm, d/b/a Wallick and Schwalm Company, et al.*, 198 F.2d 477, 483 (3d Cir. 1952); *Monahan Ford Corporation of Flushing*, 173 NLRB 204 (1969); *L.B. Foster Company*, 168 NLRB 83, 86 (1967). Accordingly, I find Sullivan (on September 19) made the remarks attributed to him by Smith, and thereby advised Smith that his job was in jeopardy if he continued discussing wage rates with other employees. I find further that Sullivan's remarks contain the requisite effect to render them coercive within the meaning of Section 8(a)(1) (*Impact Die Casting Corporation*, 199 NLRB 268, 271 (1967)), for they surely portend adverse consequences on Smith's employment status.

[4] Gardner did not testify at the hearing.

It is clear that Smith initiated his wage rate discussions with the other employees because he believed he had not received the wages promised him. Smith's action began the chain of discourse among the employees during which they, too, expressed their own wage complaints. Such action is held to constitute protected concerted activity within the meaning of the Act. *Jeannette Corporation*, 217 NLRB 653, 656-657 (1975). Those discussions culminated in the employees' demand to speak with Sullivan. Admittedly, the employees indicated their concern over their wage rates to Sullivan. Thus, I find that Smith and the other employees, throughout these events, were engaged in protected concerted activity.

Inasmuch as I have found the proscribed remarks of Sullivan were issued by him in response to the employees' protected concerted activity, I also find his September 19 warning to Smith comprises a violation of Section 8(a)(1) of the Act, as alleged.

(2) The complaint, paragraph 8(b), alleges that Sullivan unlawfully promised benefits and adjustment of employee grievances, in mid-September, in order to discourage their activity protected by the Act.

In support of this allegation, the General Counsel relies on the occurrences at a meeting conducted on September 23 by Sullivan with the production and maintenance employees. The record is unclear as to the specific date on which this meeting was held but it is uncontroverted the meeting was held in September sometime after the confrontation by the employees with Sullivan on September 16.

Smith testified that the meeting opened with Sullivan stating, "Okay, you know, I know you guys are unhappy with everything. We're going to try and resolve it right here and now . . . I'm going to try to make things better. I'm going to see if I can get you guys some raises. I'm going to see if I can get the working conditions improved a little. I'm going to put up a suggestion box." According to Smith, Sullivan then outlined the procedure for employee complaints, telling the employees that complaints should be submitted to Gardner or Riccardi, and to Sullivan and Mafera as a last resort. Additionally, Sullivan said that when machine operators have problems they should be brought to Rosario.

Scott corroborated Smith's version of this meeting in all respects and expanded upon the suggestion box discussion by testifying that Sullivan told the employees that he would actually install the suggestion box.

Sullivan, acknowledging that he conducted the alleged meeting, testified it was called to give the employees a "pep talk." Sullivan recounted he was concerned that Gardner had been bypassed by the employees who had brought their work complaints directly to him (Sullivan).

Thus, Sullivan testified that he advised the employees their complaints should be first discussed with Gardner, Rosario, and Riccardi, as described above. Sullivan said he told the employees if Gardner could not resolve the problems only then should they be brought to him or to Mafera. Sullivan confirmed that he spoke of a suggestion box. He then told the employees that Respondent needed to continue the operation of the night shift despite the difficult staffing problems formerly encountered. During direct examination, Sullivan was not asked any questions regarding the alleged promise of corrective action or wage increases. On cross-examination, Sullivan said he recalled discussing only the matters of the suggestion box and the complaint procedure.

In resolving the instant issue, I credit Smith and Scott over Sullivan. Smith appeared relaxed and was direct, forthright, and explicit in his narration of events. Scott, too, impressed me with his candor. Although Respondent's able counsel seemingly made inroads upon Scott's credibility by showing an apparent inconsistency between Scott's oral testimony and prehearing affidavit on the issue of his union discussion, I am satisfied that this apparent discrepancy actually was nonexistent and was taken out of context of the complete affidavit which, at a later point, reveals Scott's prehearing statements to the investigating Board agent were consistent with his oral testimony before me. Thus, I conclude there is no reason to diminish my overall impression of Scott's credibility. In contrast, Sullivan's testimony was pervaded with inherent inconsistencies, some of which will be described below, and was quite generalized. Frequently, Sullivan was vague and he often relied on his assumptions of certain regularity of Respondent's operations, rather than his personal knowledge, to respond to questions. Based on these credibility resolutions, I find that Sullivan told the employees that he would try to correct their complaints and see if he could get them wage increases.

As indicated, paragraph 8(b) of the complaint alleges, in part, an unlawful promise to adjust grievances. No evidence was adduced to reflect Respondent had a history of grievance discussion or solicitation. Although Sullivan testified that he called the meeting with employees in order to educate them in the procedure in existence at Respondent for employees to present their complaints, and testified that he had been chagrined at them having recently brought their complaints directly to him rather than to subordinate managerial officials, I do not credit Sullivan's explanation. The totality of circumstances herein (as will unfold throughout this Decision), together with the timing of the September 23 meeting, but a few days following Sullivan's confrontation with Smith and some other employees, persuades me that the all-employee meeting was designed to stem the then apparent concerted activities. Because Respondent had no historical basis for convening this meeting it is reasonable to conclude that it was caused by the only intervening event, namely: the September 19 confrontation between Sullivan, Smith, and the group of other employees. Against this backdrop, I find Sullivan's comment that he would try to correct the employees' complaints constitutes a promise of benefit. If the employees could reasonably anticipate improved conditions of employment which might quell their concerted or union activity such a promise (to correct grievances) is unlawful (*Rotek, Incorporated*, 194 NLRB 453 (1971); *Reliance Electric Company, Madison Plant Mechanical Drivers Division*, 191 NLRB 44 (1971)), and I so find.

Paragraph 8(b) alleges, also, that Respondent unlawfully promised wage increases to the employees in mid-September. Two factors are most relevant. First, I have credited Smith who explicitly testified that Sullivan told

the employees he would attempt to obtain wage increases for them. Second, there is evidence (G.C. Exh. 7) which indicates that unit employees Fernardo Alvarado and Jose Torres were granted wage increases from $3.15 and $3.25 an hour to $3.25 and $3.35, respectively, effective virtually simultaneous with the meetings between Sullivan and the employees. Regarding wage increases, the evidence shows it was Respondent's policy to grant them annually. These customarily occurred in April of each year. No evidence was adduced to show why Alvarado and Torres were granted wage increases in September. Thus, these two increases in wages are unexplained. Considered in the context of Sullivan's comments that he would try to get wage increases for the employees, it is not unreasonable to presume those which were granted were connected to his promise, and give it meaning. The virtually inescapable conclusion is that the promise was made to discourage the employees from continuing to engage in their protected concerted activity, and I so find.

Upon all the foregoing, I find that when Sullivan told the employees he would try to get them wage increases and correct their complaints, Respondent violated Section 8(a)(1) of the Act, as alleged.[5]

Smith, who was uncontradicted on this matter, testified that the wages he received subsequent to his wage rate complaint, as described above, had not reflected the wage that he believed he had been promised. Smith spoke with Gardner about this. Gardner suggested Smith speak to Sullivan. Smith reminded Gardner that Sullivan had told him that he did not want to hear any more complaining. Gardner nonetheless advised Smith he (Gardner) could do nothing. Accordingly, Smith contacted a union representative who arranged to have an organizational meeting with employees on October 2. Smith personally invited approximately 12 unit employees to the meeting. According to Smith, Rosario was among those employees to whom he spoke of the organizing meeting. Smith credibly testified that he asked Rosario if he would be interested in the Union.[6] Scott assisted in the organizational effort by having invited unit employee Jewers to the October 2 meeting and spoke to other employees about the Union prior to the meeting. There is no evidence that any other employee was active in the Union's initial organizational effort. Smith was used as the employee coordinator for the Union by its full-time organizer until Smith's October 12 termination. On October 2, 12 production and maintenance employees met in the union office with International Organizer Reyes. All 12 employees, including Rosario, signed union authorization cards.[7]

By letter dated October 5, Reyes advised Respondent that the Union represented a majority of the production and maintenance employees and requested a meeting for purposes of negotiating a collective-bargaining agreement. It was stipulated that this letter was received by Respondent on October 6. Additionally, on October 5, Reyes filed a petition for a representation election (Case 1-RC-15390) with Region 1 of the Board. The parties stipulated that Respondent received a copy of the petition no later than October 11. By letter dated October 12, Respondent's attorney declined to recognize the Union claiming Respondent had a good-faith doubt of the asserted majority.

(3) The complaint, paragraphs 8(c) and 16(a), alleges that Respondent violated Section 8(a)(1) and (5) of the Act when it granted a wage increase to Feliciano (Felix) Vega and, according to the General Counsel's arguments, to Gilberto Garcia on February 23, 1978.

The evidence reveals that, concurrent with the decision to terminate Smith and Scott,[8] Vega and another employee, Hector Ortiz, were reassigned to the night shift positions left vacant by the termination of Smith and Scott.

Mafera admitted that the unit employees confronted him on October 13, after Smith and Scott had been terminated and Vega and Ortiz were directed to work the night shift. Mafera said the employees ceased their work apparently to protest the Vega-Ortiz assignment. On Mafera's agreement to discuss the situation with Vega and Ortiz, the other employees returned to work. That day, Mafera discussed these assignments with the two employees involved. Each of them periodically had been working on the night shift at least since April. The record is replete with evidence to the effect that both of them had grudgingly worked on that shift and had been vocal in their dissatisfaction with it. It is undenied that during the October 13 conversation with Vega, Mafera agreed to give Vega an additional 10 cents per hour. According to Mafera, this was to reimburse Vega for additional automobile expense he was required to pay. (Ortiz had lost his driver's license and Vega regularly transported both of them to work). Sullivan testified that the increment given Vega was "reimbursement for expenses." This testimony was elicited by extremely leading questions. Despite this characterization of the additional sum granted to Vega, it was admitted that the 10 cents was reflected in Respondent's records as wages and was subject to the customary withholding deductions.

Whether or not the 10-cent increase provided Vega is considered a wage increase in the literal sense, I consider its grant to be violative of the Act. The record is bare of evidence reflecting whether Respondent previously provided any employee remuneration for travel or other out-of-pocket expenses. Vega's increase was granted simultaneously with Respondent's receipt of the Union's demand letter and notice that the election petition had been filed. The grant occurred in the context of face-to-face discussion between Mafera and Vega, stimulated by the cessation of work by the other employees, all of

[5] In fn. 9 of his brief, counsel for the General Counsel moved to amend the complaint "so that paragraph 8(a) covers the September 23 employee meeting with Sullivan." I consider this motion to be tantamount to a motion to amend the pleadings. Despite the propriety of granting such a motion at this juncture of the proceedings, the motion is hereby denied because I find no evidence of activity during the September 23 meeting to reflect that any employee had been explicitly or impliedly threatened with reprisals. This threat forms the gravamen of complaint par. 8(a). Such motions to amend, based on no factual support, should be discouraged.

[6] Rosario did not testify at the hearing.

[7] The character of the cards will be further discussed, *infra*, within the discussion of the refusal-to-bargain allegations, sec. III, D.

[8] The terminations will be separately discussed, *infra*, in sec. III,C.

which took place on the day immediately following the discharges of Smith and Scott. In these circumstances, I deem the 10-cent increase to Vega had the reasonable tendency to coerce employees to abandon their concerted and/or union activities. Accordingly, I find that Vega's 10-cent increase on October 13 constitutes a violation of Section 8(a)(1) of the Act.

Additionally, as I shall find hereinbelow that when Vega was granted the 10-cent increase the Union represented a majority of the unit employees, for Respondent to have discussed the matter with Vega and given him the increase comprises an unlawful unilateral grant of benefit in violation of Section 8(a)(5) of the Act. Hence, I find there is merit to paragraph 16(a) of the complaint. Even considering Respondent's claim that it merely desired to reimburse Vega for necessary additional automobile expense, and that this is a legitimate business reason because it assured the presence at work of both Vega and Ortiz, these elements are not a sufficient defense. Such good faith is irrelevant in the context of an existing duty (which I find below) to bargain collectively with the Union. *N.L.R.B.* v. *Benne Katz, etc., d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736 (1962).

I also find the February 1978 increase to Garcia violates the Act. Respondent's records reveal Garcia was first hired in February 1977 and was paid $3.15 per hour until February 23, 1978, when he was granted a 10-cent wage increase. It is undenied that Respondent had no policy or practice of providing wage increases to employees upon their anniversary dates. The only practice, as noted above, which existed on wage increases was the one by which the employees received annual increases in April each year. Thus, Garcia's February 1978 increase is unexplained. Viewed in the best posture to Respondent it might be said that Garcia's increase was but a minor acceleration of its past practice of granting April increases. However, in the totality of circumstances herein, especially where I will conclude below that the Union was the majority representative of the employees, I find that Garcia's increase had the tendency to diminish the appeal of the Union to the employees (*Pennco, Inc.*, 212 NLRB 677, 685–686 (1974)) and thus constituted a unilateral grant of benefit violative of Section 8(a)(1) and (5) of the Act.

Upon all the foregoing, I find merit to the allegations contained in paragraphs 8(c) and 16(a) of the complaint.

(4) Complaint paragraph 8(d) alleges that several times in October and November Respondent unlawfully solicited an employee to assist in its antiunion campaign.

This allegation is based on Mafera's confusing and sometimes self-contradictory testimony regarding discussions he had with Rosario, preparatory to convening a preelection meeting with the unit employees. A stipulation for consent election was signed by Respondent on November 14. A Board-conducted election had been scheduled for December 9.

When testifying as an adverse witness pursuant to Rule 611(c), Federal Rules of Civil Procedure, Mafera testified that he spoke to Rosario several times to enlist his assistance in speaking to the Spanish employees. Mafera admitted he told Rosario he was aware of union activity and that he wanted to meet with all the employees to explain Respondent's position. Mafera said he told Rosario he was opposed to the Union and requested Rosario to inform the employees of his (Mafera's) feelings. When testifying on behalf of Respondent, Mafera said that he met only once with Rosario sometime after Respondent signed the consent election agreement, and then only for the purpose of requesting Rosario to act as his interpreter. During his testimony as Respondent's witness, Mafera was not asked to deny his earlier testimony to the effect that he advised Rosario he was opposed to the Union.

In a rather nebulous explanation of his theory, the counsel for the General Counsel claims "the vice of Mafera's actions was his coercive attempts to prevail upon Rosario to further Respondent's antiunion campaign by utilizing a direct personal touch among the employees." Further, the General Counsel asserts Mafera's solicitation of Rosario was "coercive and placed Rosario in an untenable position."

Respondent urges that Mafera "simply needed a Spanish translation of his remarks for the benefit of his Spanish speaking employees as well as a translation of a notice to be posted regarding the scheduled election." Thus, Respondent claims the activity underlying the instant allegation is "an innocent event."

I find merit to the General Counsel's contentions. The test applied in determining whether a violation of Section 8(a)(1) of the Act has occurred is "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *Electrical Fittings Corporation, a subsidiary of I-T-E Imperial Corporation*, 216 NLRB 1076 (1975). In assessing the import of Mafera's request of Rosario, I have considered that Mafera's first testimony that he spoke on more than one occasion to Rosario concerning this matter is more reliable than his assertion, when called as a Respondent witness, that he addressed Rosario only once on this subject. In this connection, I have also considered the uncontradicted testimony of Smith, who said that Rosario told Smith (on October 6) that the "Company" asked Rosario if he knew anything about anyone trying to organize. Smith said that on October 7 Rosario once again reported a second interrogation of this type. Evidentiary hearsay of this character properly is used in Board proceedings. In *Richardson, Secretary of Health, Education and Welfare* v. *Perales*, 402 U.S. 389 (1971), the Supreme Court held that reports which were clearly hearsay in character by themselves constituted substantial evidence sufficient to support an administrative finding. In so ruling, the Court commented that although "hearsay in the technical sense . . . would be deemed formally inadmissible in judicial proceedings," it would not reject "administrative reliance on hearsay irrespective of reliability and probative failure." 402 U.S. at 407. Thus, I find that Mafera spoke with Rosario more than once to obtain his support.

Additionally, I have considered the context of Mafera's admitted request for Rosario to act as interpreter. This request was made after Mafera made his opposition to the Union known to Rosario. It is unlawful for an employer to place employees in the position where their sympathies might become known. In a case factually dis-

similar, but analogous, to the case at bar, the Board declared that the vice inherent in advising employees that their identity as card signers could become public knowledge is derived from the potential that the employees could be subjected to fear discrimination and reprisals against them. *L.S. Ayres & Company, a Division of Associated Dry Goods Corporation*, 221 NLRB 1344 (1976). When confronted with the repetitious nature of Mafera's requests to advise the employees of his (Mafera's) sentiments about the Union and ultimately act as his interpreter, what was Rosario to do? I conclude he was faced with the inevitable dilemma of acceding to Mafera's request or refusal to do so. The latter alternative might require Rosario to reveal prounion sentiments while the former tends to inhibit his freedom of expression guaranteed by Section 7 of the Act. In these circumstances, I conclude Mafera's request of Rosario reasonably had the effect proscribed in Section 8(a)(1) of the Act. Accordingly, I find merit to paragraph 8(d) of the complaint.

C. *Discrimination*

The General Counsel contends that the October 12 discharges of Smith and Scott were discriminatory within the meaning of Section 8(a)(3) of the Act in that Respondent retaliated against them for having engaged in protected concerted activities and for having been the leading union proponents among its employees. Respondent asserts that the record is devoid of evidence that it was aware of any protected concerted or union activities engaged in by Smith and Scott and, in any event, urges the terminations were justified by business considerations. Thus, Respondent claims it had an excess of machine operators on its payroll and needed to reduce its production and maintenance force by eliminating two machine operators.

As observed earlier in this Decision, Smith and Scott started work in September. It is conceded they were the least senior machine operators. At the time of their discharges the two of them comprised the entire work force on the night shift. Both Mafera and Sullivan testified that the night shift was an essential adjunct to Respondent's total production process. That shift was first instituted in 1976, discontinued, and reinstituted in the spring of 1977. As earlier indicated, throughout the operation of that shift Respondent consistently had difficulty in maintaining a stable work force. Smith started working on the night shift on September 13 and worked there, operating a wire weaving machine (Bergundi) until the week beginning October 3. Vega and Ortiz also worked the night shift operating a weaver and wire-draw machine, respectively. On October 3, Scott replaced Ortiz, who was transferred to the day shift. On October 3, 4, and 5, the night shift consisted of Smith, Scott, and Vega. Thereafter, until their October 12 discharge, Smith and Scott, alone, constituted the night shift. They worked alone but 2 nights—October 6 and October 11.[9] The following Monday, October 11, was a legal holiday and Smith and Scott were not scheduled to work. Each of them was terminated by Sullivan by telephone, on October 12, acting pursuant to Mafera's instructions. Another employee, Ricardo Aponte, was also terminated that day. Aponte was not a machine operator. Both Smith and Scott, without contradiction from Sullivan, testified that when they were discharged Sullivan told them Respondent was "letting the second shift go." On October 15, Smith went to Respondent's premises for his final check. He asked Sullivan if there was any chance of returning to work on any shift and Sullivan responded there was not. Scott testified that he periodically made telephone calls to Respondent to inquire about reemployment until January 1978. Scott recounted that, during a telephone conversation prior to Christmas 1977, he spoke with Sullivan and asked him if there still was lack of work. Scott's uncontradicted testimony reveals Sullivan responded "yes, and by the way weren't you one of the ones to have two [sic] something to do with the Union?" Scott testified he disclaimed knowledge of the Union to which Sullivan responded, "Oh well, it must have been the other person."

1. Knowledge of concerted and union activity

As noted, Respondent claims it had no knowledge its employees were engaged in activities protected by the Act. Patently, this claim has no merit with respect to Smith's concerted activity. Sullivan's discussions with a group of employees on September 19 and his threat of the same date to discharge Smith (narrated, *supra*, in sec. III, B) are sufficient to impute knowledge of Smith's concerted activity to Respondent. Hence, I find that Respondent, at all times material, had knowledge of the concerted activity (which I have found to be protected) by Smith and other employees.

With respect to Respondent's knowledge of the employees' union activity in general, and that of Smith and Scott in particular, it is true that there is no direct evidence Respondent was aware of it. The General Counsel bears the burden of proof to establish knowledge of the protected activities. Such knowledge may be inferred when the entire circumstances permit. *Circle K Corporation*, 173 NLRB 713, 714–715 (1968); *Texas Industries, Inc.*, 156 NLRB 423, 424–426 (1965); *Sam Tanksley Trucking, Inc.*, 198 NLRB 312, 316 (1972).

I am persuaded that the record as a whole contains substantial evidence from which to infer that Respondent was aware of the general and specific union activities of its employees. This conclusion is based on a variety of factors. First, I rely on Smith's testimony that, on October 6 and 7, Rosario told him he had been called into Respondent's office and asked whether he (Rosario) knew anything about the Union. Smith's testimony in this connection is fully set out as follows from pages 358–360 of the official record:

> Q. (By Mr. Stieglitz) to direct your attention to that day of October 6th. Did you speak to Mr. Rosario that particular day?
>
> A. Yes, I had.
>
> Q. Without getting into the full conversation, what was the subject of that conversation?

[9] On Friday, Ocotber 7, Smith and Scott worked on the day shift, it having been a standing practice for no night shift to be operated on Friday night.

A. On whether—well, it had to do with the company being notified by the union; and they wanted to know if he knew anything about it. That was the extent of it.

Q. That was the conversation. My question to you was—let me ask it this way, maybe. How did this conversation come about?

A. He—I was working on my machine. He approached me. I asked him, I says, "Well, what happened?" I'd heard he had been called up to the office. He said, "They just asked me if I knew. I said I didn't know."

Q. They asked him if he knew what?

A. I asked him—

JUDGE ZANKEL: Rosario told you he had been called to the office?

THE WITNESS: Yes.

JUDGE ZANKEL: And then you asked him what happened?

THE WITNESS: Yeah. What had happened.

JUDGE ZANKEL: Go ahead.

THE WITNESS: He said they wanted to know if he knew anything about anybody trying to organize a union; and he said no.

Q. (By Mr. Stieglitz) Now, I want to direct your attention to the Friday after that, which would be the next day. Did you see Mr. Rosario that day?

A. Yes, I did.

Q. Did you see anything in particular that happened to Mr. Rosario that day?

A. Yes. At that time, on that Friday he was then called up again to the office.

Q. Stopping there—did you witness this?

A. Yes, I did.

Q. From that point what happened, if anything?

A. Just about the same as the day before.

MR. TURNEY: Uh—

MR. STIEGLITZ: Is there an objection?

JUDGE ZANKEL: Ask another question.

Are you objecting?

MR. TURNEY: Not yet.

Q. (By Mr. Stieglitz) You indicated you witnessed Mr. Rosario being called to the office?

A. Yes.

Q. Now, after that incident did you have a conversation with Mr. Rosario?

A. Yes. He came back down. He again approached me, said that they again had asked him whether he knew anything about the union. He said no.

While it is true that the above-quoted testimony contains no indication that Rosario actually informed Respondent of the nature of the union activity or the individuals involved in it, I consider the interrogation of Rosario indicative of Respondent's knowledge that union activity was in progress and its concern in it. I note that the first time Rosario was called into the office was the date on which the Union's letter requesting recognition had been received by Respondent. The testimonial abstract set forth above is included in this Decision to demonstrate the basis for my reliance on it. As previously indicated, I acknowledge Smith's testimony to constitute hearsay. Nonetheless, the transcript abstract reveals that Respondent's counsel made no objection to it. Unobjected-to hearsay is admissible and has probative value. *N.L.R.B.* v. *International Union of Operating Engineers, Local Union No. 12* [*Ledford Bros.*], 413 F.2d 705 (9th Cir. 1969).

Next, I rely on the timing of Smith's and Scott's discharge. Mafera and Sullivan admitted they speculated as to the identity of the individuals for whom the Union filed the instant charge. They testified that they believed that Vega and Ortiz were involved. I find this explanation implausible because that speculative conclusion is supposed to have been made by Sullivan and Mafera after Respondent received a copy of the charge *2 days subsequent to* Smith's and Scott's discharge. Moreover, it is reasonable to assume that Mafera believed Vega and Ortiz had been satisfied by the grant to Vega of his 10-cent increase for "automobile expenses." Thus, no logical reason existed to believe Vega and Ortiz would have complained about unlawful discrimination toward them. More persuasive is the fact that the decision to terminate Smith and Scott was admittedly made by Mafera just a few days after receiving the Union's demand letter, after Rosario had been interrogated in Respondent's office, and within 1 day of Respondent's receipt of the Union's representation petition.

Also, in connection with the timing I have considered the evidence which reveals that responsibility for maintaining the night shift operation, and hiring personnel to work that shift, had been vested by Mafera in Sullivan. Despite this, while Sullivan was away from the shop on vacation, it was Mafera who precipitously decided to terminate Smith and Scott. Also, I have considered the undenied evidence that Respondent had no prior history of layoffs of an entire shift. This evidence, coupled with Mafera's and Sullivan's testimony to the effect that operation of a night shift was imperative and evidence revealing it operated with three employees since the discharges and up to the hearing dates, convinces me that Mafera had knowledge of Smith's and Scott's participation in the Union's organizing efforts. Timing of the terminations and the absence of a past practice of layoffs are appropriate factors to be considered as circumstantial evidence on the issue of employer knowledge of union activities. *American Grinding & Machine Co.*, 150 NLRB 1357, 1358 (1965).

Further, I rely on the so-called small plant doctrine, although I do not solely base my finding of employer knowledge on that theory. At all relevant times there were no more than 20 employees in the appropriate bargaining unit. The record clearly reflects that Mafera and Sullivan were in constant daily contact with the production process and the employees. Additionally, Rosario, as working foreman, was among the unit employees at all times. Also, as earlier indicated, Rosario was invited to attend the October 2 union meeting by Smith, attended it, and later went to Smith's house with the other employees. Although it has been argued that the small plant theory has been discredited, the Board recently used it as

an element of its findings of employer knowledge. *Coral Gables Convalescent Home, Inc.*, 234 NLRB 1198 (1978).

Finally, I have considered the pretextuous nature of Respondent's defense (to be discussed, *infra*) to arrive at my conclusion that Respondent was aware of Scott's and Smith's union activities.

Upon the foregoing, I find that the General Counsel has established Respondent's knowledge of the union activities by substantial evidence. *Lyn-Flex Industries, Inc.*, 157 NLRB 598, 599 (1966).

2. Animus

An essential ingredient of an 8(a)(3) violation is the presence of union animus. I find the following elements present herein to demonstrate that Respondent harbored this requisite of a violation: (a) Mafera's opposition to unionization of Respondent's employees, expressed by his testimonial admissions, and by him several times (as earlier described) to Rosario; (b) the commission by Respondent of the unfair labor practices which I have found to constitute violations of Section 8(a)(1), *supra*; and (c) Sullivan's pre-Christmas 1977 inquiry of Scott (described *supra*), as to whether Scott was not one of the employees who had something to do with the Union. I view that remark reflects Respondent's attitude toward unionization and those employees who engaged in union activity. Although concededly uttered 2 months after the discharges, to neglect such cogent evidence of Respondent's antiunion attitude would be to exalt form in disregard of substance. Expressions of attitude toward unions made after discharges are appropriately considered as evidence of animus. *Jeffrey P. Jenks d/b/a Jenks Cartage Company*, 219 NLRB 368, 369 (1975).

3. Respondent's defense

The General Counsel contends that Smith was discharged because of his protected concerted and union activities and Scott for engaging in union activities. Respondent urges that it had a "compelling, legitimate, and eminently logical reason" for terminating them. Specifically, Respondent asserts it needed to reduce the number of employed machine operators by two to be consistent with the number of operating machines.

During his testimony as an adverse witness, Mafera stated that after Scott and Smith were assigned to the night shift he received negative reports on their progress and operations from Gardner. Also, Mafera testified that he asked Rosario how Smith and Scott were responding to their training, and Rosario also provided negative reports. Scott had been injured by a wire which snapped in his face on October 6. Mafera testified that on October 7, when Gardner reported the injury to him, he indicated to Gardner that he was upset about the conditions on the night shift. Mafera claimed that, on October 12, he asked Gardner for a report on the night shift production and Gardner responded there was not much production. Thereupon, Mafera testified that he decided to terminate Smith and Scott after analyzing the personnel complement and advised Gardner and Rosario (and later Sullivan) to fire the two least senior machine operators and that the night shift would now be operated 5 nights instead of 4.

When testifying as a witness on behalf of Respondent, Mafera seemingly altered his reason for the discharges. Thus, Mafera testified that his decision to terminate two machine operators was based on a mathematical equation. Mafera testified that he had decided, on October 12, that he wanted four machines operating on the day shift and named the operators who should work on them. He then advised Rosario and Gardner to assign Vega and Ortiz to the night shift. After making that determination, Mafera testified that he observed that he had three operators whom he considered excess—Smith, Scott, and Aponte.[10]

Counsel for the General Counsel argues the above evidence demonstrates that Respondent shifted its reasons for the terminations. Respondent's argument assimilates Mafera's 611(c) testimony with that given as a defense witness. Thus, Respondent contends Mafera only was secondarily concerned with the reports of low production on the night shift and that element merely was a catalyst stimulating Mafera's consideration of Respondent's personnel needs. Thus, Respondent's defense is founded principally on Mafera's determination of its numerical requirements.

It is well established that an employer may discharge an employee for good reason, bad reason, or no reason at all. *Borin Packing Co., Inc.*, 208 NLRB 280 (1974); *Associated Press* v. *N.L.R.B.*, 301 U.S. 103 (1937); *Edward G. Budd Manufacturing Co.* v. *N.L.R.B.*, 138 F.2d 86, 90 (3d Cir. 1943), cert. denied 321 U.S. 773 (1944). It is the General Counsel's burden to establish a particular motivation on the part of an employer—a discriminatory motivation. Support for a finding of unlawful motivation "is augmented [when] the explanation of the discharge offered by the respondent [does] not stand up under scrutiny." *N.L.R.B.* v. *Bird Machine Company*, 161 F.2d 589, 592 (1st Cir. 1947).

A fair assessment of all the record evidence persuades me that Respondent's defense does not withstand scrutiny. While I have considered all the relevant evidence and arguments thereon, I perceive the following factors vitiate Respondent's defense.

(a) Neither Scott nor Smith was criticized for poor work. It is undenied that, throughout their employment with Respondent, neither dischargee had been warned, reprimanded, or disciplined for failure to properly perform his work. Indeed, as indicated above, Scott had been assigned to the night shift only 2 working days before his discharge. Thus, until Mafera's October 12 decision to terminate Smith and Scott, there is no evidence of a hint that he had been concerned with their alleged poor production. This diminishes the effect of Mafera's testimony that it was Smith's and Scott's poor production which stimulated his concern for the numbers of machine operators then employed.

[10] Later in his testimony, Mafera said that Aponte had not been a machine operator. In fact, Respondent's records (G.C. Exh. 7) show Aponte's job classification as "floor worker" and reveal he worked only 8 hours during the payroll week ending October 6 and 24 hours during the payroll week ending October 13.

(b) Respondent historically suffered staffing difficulties on the night shift. There is considerable record evidence showing that, at least since April, night shift employees, especially Vega and Ortiz, expressed displeasure at having to work nights. Even Mafera testified that he instructed Sullivan to obtain permanent night shift employees. Sullivan did this by hiring Smith and Scott. Considered in the light of Respondent's admitted need to maintain a night shift operation, it is clear that the assignment of Smith and Scott to night shift satisfied Respondent's requirement. Although Mafera testified he had received reports of poor performance from Rosario and Gardner, neither of them testified. In this context, I do not credit Mafera's assertions that he took the quality or quantity of Smith's and Scott's production into consideration at all, as he claimed.

(c) Mafera's explanations are inherently controverted by Sullivan's testimony. As noted, it was uncontradicted that Sullivan told Smith and Scott that the night shift *had been eliminated* when he discharged them. Moreover, Sullivan testified that was the reason Mafera gave *him* for the discharges when he requested Sullivan to advise Smith and Scott of their terminations. It is illogical to believe Mafera would have informed Sullivan of such a reason if he (Mafera) in fact had determined that Respondent was then employing an excessive number of machine operators. This situation becomes more incredible because of Mafera's testimony that he *did* tell *Gardner* and *Rosario* of the excessive employee complement. The reason for his failure to, also, so inform Sullivan is unexplained. Even if a reasonable explanation for this omission could be offered, it is clear that the reason for the discharge provided by Sullivan was false. As indicated, *supra*, the night shift continued to operate without interruption until the hearing and then at the increased pace of 5 nights per week.

(d) Respondent historically countenanced an excessive number of machine operators. Mafera specifically admitted he had been aware that Respondent was overstaffed with machine operators at least since September. Presumably, his reference to that month coincides with the hiring of Smith and Scott. Admittedly, Mafera took no action to reduce Respondent's staff until immediately after receipt of the Union's demand letter and petition. The record reveals that there was sufficient work to keep all the employees at work during the time of the alleged overstaffing. This was done by doubling operators on some equipment and by temporarily assigning machine operators to do other necessary work.

(e) Mafera departed from Respondent's normal routine in discharging Smith and Scott. As already indicated, there is no history of any layoffs prior to October 12. Noteworthy is the fact that it was Mafera who made the discharge decision without prior consultation with Sullivan. Mafera only used Sullivan as the conduit by which Smith and Scott were advised of their terminations. One of Sullivan's principal responsibilities was personnel. He functioned in this regard during the hiring of Smith and Scott and was later consulted from time to time as to their progress. As earlier noted, Sullivan was on vacation at the time of Respondent's receipt of the representation petition. That occurred but 1 day before Sullivan's return from vacation. Mafera sought to excuse his failure to consult Sullivan regarding the terminations by claiming he was upset by the adverse night shift conditions for which he blamed Sullivan. In the framework of the 8(a)(1) violations, which preceded October 12 and the October 6 and 7 inquisition of Rosario, I am unable to, and do not, credit this explanation. Without intending to transgress on managerial decisionmaking, I think it reasonable to conclude that members of supervisory hierarchy would consult one another even when their views are diverse. Even Mafera's testimony suggests this routine, for he claimed that when he received the October 12 reports from Rosario and Gardner and advised them of his intention to terminate Smith and Scott, he also asked them for their suggestions as to alternative procedure. I consider the failure of Mafera to consult Sullivan, in the instant context, strongly suggests that the defense proffered by Mafera is but a fabrication to shield Respondent from its real reason for the discharges.

Upon all the foregoing, I conclude that Respondent's asserted defense is a pretext to disguise the moving cause for the discharge of Smith and Scott. Assuming, *arguendo*, I would conclude that the excessive number of machine operators comprises a valid cause justifying the discharges, I conclude that the totality of the discharges was the union activity of Smith and Scott. By doing so, the illegal character of those discharges is not removed. *Dilene Answering Service, Inc.*, 222 NLRB 462 (1976); *KBM Electronics, Inc., t/a Carsounds*, 218 NLRB 1352, 1358 (1975); *Winkel Motors, Inc.*, 178 NLRB 627 (1969), affd. 443 F.2d 38 (9th Cir. 1971); *N.L.R.B.* v. *Whitin Machine Works*, 204 F.2d 883, 885 (1st Cir. 1953).

In finding Respondent violated Section 8(a)(3) of the Act, I am mindful of two separate contentions of Respondent. First, it urges that such finding is not appropriate as to Scott because of a "paucity of evidence" as to his union activity. As already indicated, Scott invited Jewers to attend the October 2 union meeting; did so himself, and signed a union card. Counsel for the General Counsel aptly argues that Scott was the only other unit employee beside Smith who overtly promoted the Union and then, in colorful (but superfluous) language, suggests that Scott was singled out for discharge by virtue of "guilt by association." However the latter contention may be, I find that both Smith and Scott were the leaders of the Union's organizing drive. The discharge of leading union advocates is a classic and effective method of undermining organizational efforts. *N.L.R.B.* v. *Longhorn Transfer Service, Inc.*, 346 F.2d 1003, 1006 (5th Cir. 1965). I find the instant record supports a finding, which I make, that Scott was engaged in sufficient union activity to warrant the conclusion that Respondent discriminated against him.

Next, Respondent has urged that the discharge of Aponte simultaneously with Smith and Scott defeats a finding of discrimination. I conclude this argument is self-defeating. Factually, I find this argument unpersuasive and irrelevant because Respondent's defense and Mafera's testimony is focused on, and limited to, the asserted necessity to reduce the number of machine operators. As previously observed, Aponte was not classified,

nor working, as a machine operator. The record reflects Aponte was hired as a temporary employee to work on galvanizing. He was not to operate a machine. As already indicated, Aponte's employment was short-lived. No explanation appears in the record for his abrupt termination. One thing, however, is clear; he was not a machine operator. Thus, Respondent's defense is not addressed to Aponte. Accordingly, I conclude that Respondent's reference to Aponte's October 12 termination is contrived to disguise the unlawful character of the Smith and Scott discharges.

Upon all the foregoing I conclude that the General Counsel has established by a preponderance of evidence that Smith and Scott were discriminatorily discharged in violation of Section 8(a)(3) and (1) of the Act, as alleged.

D. *Refusal To Bargain*

The General Counsel contends that Respondent violated Section 8(a)(5) of the Act by: (a) declining to recognize the Union by the October 12 letter to the Union from its counsel; (b) unilaterally granting the wage increases to Vega and Garcia; and (c) bargaining directly with the employees.

1. The declination of recognition

(a) *The appropriate unit*

The complaint alleges, Respondent admits, and I find that the following unit of Respondent's employees constitute an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, including working foremen, employed by Respondent at its Medford, Massachusetts, plant, exclusive of office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) *The Union's majority*

There were 12 authorization cards received in evidence. In salient part, those cards authorized the Union "to act as my collective bargaining representative in all matters of wages, hours and working conditions."[11] Each of these cards was dated either October 2 or 3. One of the cards was signed and dated by Kenneth Jewers. The record reflects that Jewers' last day worked was October 5. Thus, on October 6, the date of the Union's demand, I find that 11 unit employees had designated the Union as their representative for collective-bargaining purposes. The parties agreed that 16 employees comprised the total unit on October 6.

The parties did not agree on the status of Jewers (whom I have already eliminated, effective October 5), alleged discriminatees Scott, Smith, William Kazaka, and Aponte.

Inasmuch as I have already found that Smith's and Scott's terminations were discriminatory, they will be included in calculation of the total unit composition and their cards will be counted in calculation of the majority. *Pacific Tile and Porcelain Company*, 137 NLRB 1358, 1365-66 (1962); *Sioux City Brewing Company*, 85 NLRB 1164, 1166 (1949).

Kazaka, on October 6, was in the midst of an extended leave of absence due to an injury. Counsel for the General Counsel does not dispute his inclusion in the unit. Kazaka was not one of the card signers. On the basis of the record before me, Kazaka will be included in computation of the unit's size.

Aponte was hired by Respondent in a unit position on October 6. As already indicated, he was terminated on October 12. Apparently accepting Sullivan's testimony that Aponte was hired as a temporary employee, counsel for the General Counsel claims that Aponte should not be considered within the unit. Inasmuch as the totality of evidence reflects only the dates of hire and termination, his job classification as floor worker, and Sullivan's assertion that he was a temporary employee, I conclude he should be excluded from the unit because it is clear that his employment had not been for an indefinite period and it appears there is no likelihood his employment will resume. Cf. *Orchard Industries, Incorporated*, 118 NLRB 798 (1957); *Horizon House 1, Inc., Horizon House 2, Inc., Horizon House 4, Inc.*, 151 NLRB 766 (1965).

Upon the foregoing, I find that on October 6 the appropriate unit consisted of the 16 employees whose status was not disputed, plus Smith, Scott, and Kazaka. Thus, I find that the total unit on the demand date consisted of 19 employees. I also find that on October 6 the Union enjoyed a majority support from 11 of those employees. Even if Aponte were included in the unit because of his employment on October 6, such a finding would not adversely affect the Union's majority because it would have held 11 valid[12] cards in a unit of 20 employees.

(c) *The request and refusal to bargain*

As already indicated, the Union made a written demand by letter dated October 5 and received by Respondent on October 6. By letter dated October 12 Respondent's counsel declined recognition and the record reflects that, at all times thereafter, no such recognition had been granted. Accordingly, I find that at all times since October 12 Respondent has refused or failed to grant recognition to the Union.

I conclude that the record contains all requisite elements of a refusal-to-bargain violation, as alleged in paragraph 16 of the complaint. On October 6, the Union represented a majority of employees in the appropriate bargaining unit and sought recognition; Respondent refused to recognize and bargain with the Union while engaging and having engaged in the various and substantial unfair labor practices in violation of Section 8(a)(1) and (3). Thus, the requisite proof of an 8(a)(5) violation is present. *N.L.R.B.* v. *Gissel Packing Co. Inc., et al.*, 395 U.S. 575 (1969); *Farah Supermarkets, Inc., d/b/a Meat Proces-*

[11] I conclude the complete text of the authorization cards shows that they are so-called single-purpose cards, there being no language on them to indicate either that they are to be used to support a representation petition or as an application for membership in the Union.

[12] Respondent makes no attack in its post-hearing brief on the validity of the authorization cards.

sors of Green Bay, 228 NLRB 984 (1977). *Seven-Up Bottling Company of San Francisco*, 235 NLRB 297 (1978).

2. Paragraphs 16(a) and (b)

Inasmuch as I have already discussed the content of the allegations of complaint 16(a) *supra*, no further discussion is necessary. I reiterate my earlier-mentioned finding that Respondent, by unilaterally granting wage increases to Vega and Gilberto Garcia, violated Section 8(a)(5) and (1) of the Act.

Paragraph 16(b) of the complaint alleges that Respondent refused to bargain with the Union by having bargained directly with employees. This allegation evolves from the October 13 meeting Mafera had with Vega and Ortiz which resulted in the grant of Vega's 10-cent-an-hour increase for travel expenses. The only evidence relative to what was said among the participants at that meeting reveals that Vega had requested an increase. No precise other discussion appears. However, it is clear that Respondent yielded to Vega's request for an increase. Because I have found that the Union enjoyed majority support from the unit employees at the time this meeting was held, I further conclude Mafera's discussion with Vega and Ortiz on October 13 derogated that authority. Hence, I find that the evidence supports the allegation contained in complaint paragraph 16(b).

Upon the basis of the above findings of fact, and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By having threatened Smith with discharge because he engaged in protected concerted activities, Respondent violated Section 8(a)(1) of the Act.
4. By having promised wage increases to its employees and promised to adjust their grievances in order to discourage their protected concerted activities, Respondent violated Section 8(a)(1) of the Act.
5. By having granted a wage increase to Vega in order to discourage his union activities and those of the other employees, Respondent violated Section 8(a)(1) of the Act.
6. By having requested Rosario to assist Respondent in conveying its position on unionization to other employees, Respondent violated Section 8(a)(1) of the Act.
7. By having discharged Joseph L. Smith and Kevin W. Scott on October 12, 1977, Respondent discriminated against employees and violated Section 8(a)(3) and (1) of the Act.
8. All production and maintenance employees of Respondent, including working foremen, employed at its Medford, Massachusetts, plant, exclusive of office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.
9. By refusing to recognize and bargain with the Union on and after October 6, 1977, as the collective-bargaining representative of the employees in the unit found appropriate herein, Respondent violated Section 8(a)(5) and (1) of the Act.
10. By unilaterally granting wage increases to Vega and Gilberto Garcia, Respondent violated Section 8(a)(5) and (1) of the Act.
11. By bargaining directly with employees on October 13, 1977, Respondent violated Section 8(a)(5) and (1) of the Act.
12. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

It having been found that Respondent interfered with, restrained, and coerced its employees in the exercise of their protected concerted and union activities, by having threatened them with economic reprisal, promised them benefits, promised to adjust their grievances, granted wage increases and enlisted assistance to convey Respondent's antiunion sentiments, in violation of Section 8(a)(1), I shall recommend that Respondent cease and desist from engaging in such activity and post appropriate notices.

Because the record reflects Respondent employs a relatively large complement of Spanish-speaking employees, the notices to be posted shall be both in English and Spanish. The Spanish version shall be prepared by a person selected by, and under the direction of, the Regional Director for Region 1 of the Board.

Because I have found that Respondent discriminatorily discharged Joseph L. Smith and Kevin W. Scott on October 12, 1977, in violation of Section 8(a)(3) and (1) of the Act, the Order will provide that Respondent offer each of them immediate and full reinstatement to his former job or, if such position no longer exists, to a substantially equivalent position, without prejudice to his rights and privileges, and to make each of them whole for any loss of earnings he may have suffered as a result of the discrimination against them, by payment of a sum equal to that which each normally would have earned, absent the discrimination, from the date of the discrimination to the date of Respondent's offer of reinstatement, with backpay and interest computed in accordance with the Board's established standards contained in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[13]

Since I have also found that Respondent refused to bargain collectively with the Union by unilaterally granting wage increases and directly bargaining with employees in violation of Section 8(a)(1) and (5) of the Act, the Order will require Respondent to cease and desist from such activity.

With respect to the violation of Section 8(a)(5) and (1) which I have found resulting from Respondent's refusal to accord recognition to the Union, the General Counsel

[13] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

contends that the unfair labor practices found herein require a bargaining order under the principles laid down in the *Gissel* case, *supra*, and that the effective date of such an Order be October 6, 1977, according to the rationale of *Trading Port, Inc.*, 219 NLRB 298 (1975). Respondent argues that such an extreme remedy is unwarranted, citing *Munro Enterprises, Inc.*, 210 NLRB 403 (1974). I agree with Respondent's counsel that the *Munro* case suggests that the presence of discriminatory discharges does not necessarily warrant entry of a bargaining order. However, *Munro* clearly is distinguishable from the instant situation. In *Munro* a single unlawful discharge was found to exist. Additionally, Munro was found to have committed only a single independent violation of Section 8(a)(1). The Board did not provide a bargaining order to remedy those violations. In so doing, however, the Board specifically observed that the single discriminatee "was neither the leading union adherent nor in any particular leadership position among the employees with respect to the Union." Moreover, the discriminatory discharge occurred in the context of lawful economic layoffs. With respect to the independent 8(a)(1) violation, the Board specifically noted it was not of an aggravated nature and occurred more than 2 months *before* the Union's recognition demand. As already noted, the discharges before me were of the only two union activists. The discharges occurred directly in response to the receipt of the Union's demand and petition. The independent 8(a)(1) violations also were in response to, and occurred simultaneously with, the employees' protected concerted and union activities. Accordingly, I find no merit in Respondent's reliance on the *Munro* case.

In *Gissel*, the Supreme Court sustained the Board's authority to issue a remedial bargaining order in cases where unfair labor practices have been committed, such as to make a fair election an unlikely possibility. The Court defined the two situations where entry of such an order would be appropriate. The first is in those exceptional cases which are marked by "outrageous" and "pervasive" unfair labor practices (395 U.S. at 613); and the second is in "less extraordinary cases marked by less pervasive practices" which nonetheless still have the tendency to undermine majority strength and impede the election process" (395 U.S. at 614). On the other hand, the Court posed a third type of situation where a bargaining order would not be warranted; namely, where "minor or less extreme unfair labor practices" would have a "minimal impact on the election machinery" (395 U.S. at 615).

The timing and combination of Respondent's activities I have found unlawful herein persuade me that, as soon as the employees herein overtly engaged in protected concerted activities and demonstrated their interest in unionization, Respondent embarked in a program to erode and frustrate that activity. There is no need to recount those observations already made regarding the dispatch with which Respondent took action to mollify the various employee concerns with which it had been confronted. As to the discharges of Smith and Scott, I conceive of no other activity by an employer which is more outrageous and pervasive than to have rid itself of the two leading union adherents during the height of their exercise of Section 7 rights. I consider the unilateral grant of wage increases and the direct bargaining with employees to signal to them that they need not exercise their Section 7 rights to gain improvements in their wages, hours, and other terms and conditions of employment. It is inescapable that employees presented with such a condition cannot make the free choice which the Act contemplates in an election. *Seven-Up Bottling Company of San Francisco, supra.* Apparently, Respondent was not simply content with discharging Smith and Scott, but later granted Vega the unilateral wage increase. I consider the February 1978 unilateral grant of a wage increase to Garcia an extremely persuasive indicator of the permanent nature of the unfair labor practices found herein. In this context, there can be no doubt that it is unlikely a fair and untrammeled election could be conducted. Accordingly, the order will require Respondent to recognize and bargain collectively with the Union, upon request, concerning wages, hours, and other terms and conditions of employment of the employees in the appropriate bargaining unit. *Jamaica Towing, Inc.*, 236 NLRB 1700 (1978).

Inasmuch as I have concluded that Respondent's unfair labor practices clearly undermine the Union's majority status, and in view of my finding that the Union enjoyed majority status on October 6, 1977, the date on which Respondent received the Union's bargaining demand, the bargaining order will be retroactive to that date. *Seven-Up Bottling Company of San Francisco, supra*; *John G. Merkle & Sons, Inc.*, 232 NLRB 140 (1977); *Trading Port, Inc., supra* at 301.

Respondent's unlawful activities, including its discriminatory discharge of Smith and Scott, go to the very heart of the Act and indicate a purpose to defeat self-organization of its employees. The unfair labor practices committed by Respondent are potentially related to other unfair labor practices proscribed by the Act, and the danger of their commission in the future is to be anticipated from Respondent's conduct in the past. The preventive purposes of the Act will be thwarted unless the recommended Order herein is coextensive with the threat. Accordingly, in order to make effective the interdependent guarantees of Section 7 and thus effectuate the policies of the Act, the Order herein shall require Respondent to cease and desist from in any other manner infringing on the rights of employees guaranteed in the Act. *N.L.R.B.* v. *Express Publishing Company*, 312 U.S. 426 (1941); *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532 (4th Cir. 1941); *Pan American Exterminating Co., Inc.*, 206 NLRB 289, fn. 1 (1973).

Upon the above findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[14]

The Respondent, American Spring Bed Manufacturing Co., d/b/a American Chain Link Fence Co., Medford, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening to discharge employees, promising them wage increases or other benefits, and promising to adjust their complaints and grievances in order to discourage their protected concerted activities.

(b) Granting wage increases or other benefits to employees in order to discourage their union activities.

(c) Soliciting or enlisting support of their employees to relate an antiunion position so as to interfere with, restrain, and coerce them in the exercise of their Section 7 rights.

(d) Discharging or otherwise discriminating against employees in regard to hire or tenure of employment, or any term or condition of employment because they engage in union or protected concerted activities.

(e) Refusing to recognize and/or refusing to bargain with District II, International Union of Electrical, Radio & Machine Workers, AFL-CIO-CLC, as the exclusive collective-bargaining representative of the employees in the unit found appropriate herein.

(f) Unilaterally granting employees wage increases and bargaining directly with them at a time when they are lawfully represented by a labor organization.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Kevin W. Scott and Joseph L. Smith immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges, and make each whole for his lost earnings, with interest thereon to be computed according to the formula described hereinabove in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Recognize and bargain collectively and in good faith, upon request, with District II, International Union of Electrical, Radio & Machine Workers, AFL-CIO-CLC, as the exclusive collective-bargaining agent of the employees in the appropriate unit referred to hereinabove, and, if agreement is reached, reduce such agreement to writing, if requested, and sign it in execution thereof. The bargaining prescribed by this Order shall be conducted retroactive to October 6, 1977.

(d) Post at its Medford, Massachusetts, location copies of the attached notice marked "Appendix."[15] Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[14] In the event no exceptions are filed as provided in Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[15] In the event this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."